# Petition

# Petition

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NO. 81-

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1981**

---

**THE STATE OF TEXAS,**

*Petitioner*

**V.**

**LEROY GREEN,**

*Respondent*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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## QUESTION PRESENTED

Should the exclusionary rule bar admission of a voluntary confession that is the fruit of a good faith arrest that is technically illegal because of a defective affidavit underlying the warrant?

## INDEX

Page

QUESTION PRESENTED ..... i

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 4

CONCLUSION ..... 6

## TABLE OF AUTHORITIES

**Cases** **Page**

*Brown v. Illinois*, 442 U.S. 59 (1975) ..... 4

*Dunaway v. New York*, 442 U.S. 200 (1979) ..... 4

*Michigan v. De Fillipio*, 443 U.S. 31 (1979) ..... 5

*United States v. Calandra*, 414 U.S. 338 (1974) ..... 5

*United States v. Janis*, 428 U.S. 433 (1976) ..... 5

*United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) ..... 5

**Constitutions, Statutes and Rules**

U. S. Const. amend. IV ..... 2

U. S. Const. amend. XIV ..... 2

28 U.S.C. §1257(3) ..... 1

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# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE JUSTICES OF THE THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas of May 27, 1981.

## OPINION BELOW

The opinion of the Court of Criminal Appeals and the dissenting opinion are reported at 615 S.W.2d 700 (Tex.Crim. App. 1981), which appear as Appendix A and B, respectively.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3) to review a judgment of a state court on writ of certiorari.

The panel opinion reversing the conviction in this state criminal case was entered November 26, 1980. Leave to file a motion for rehearing was denied May 27, 1981. The same day a dissenting opinion by Judge McCormick joined by Judge W. C. Davis was entered. The mandate was issued June 3, 1981. On July 20, 1981, an extension of time to file this petition for certiorari was granted by Mr. Justice Powell to August 25, 1981. On July 27, 1981, the Court of Criminal Appeals withdrew its mandate for a period of 30 days pending the filing a petition for certiorari. This petition is being filed before August 25, 1981, the time granted for filing.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution Amendment IV*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

*United States Constitution Amendment XIV, Pertinent Part:*

Section 1.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Leroy Green, Respondent, was convicted for the offense of capital murder. His punishment was assessed by the jury at life imprisonment.

The night of January 12, 1975, the bodies of Warren McKay, the deceased as alleged in the indictment, and his wife were found on a road near the rural community of New Deal in Lubbock County by Sheriff's deputies. The McKays had been killed by shotgun blasts. Near their bodies were tracks of a vehicle which matched those made at the home of the McKays and the nearby Coffee residence on the evening of the homicide. That night Raymond Sanders and two of his relatives, Robert White (a half-brother) and Respondent, Leroy Green (a brother-in-law), went to the Coffee home. The Coffees knew Raymond Sanders. Later officers with a search warrant went to the home of Raymond Sanders and found two shot guns and a pickup truck which made identical tracks to those found at the McKay and Coffee homes and near where the bodies were found.

After Raymond Sanders was arrested, he talked to the officers implicating Green and the warrant for his arrest was issued by Justice of the Peace F. H. Bohlen. The complaint or affidavit dated January 15, 1975, was made by C. H. Blanchard, Sheriff of Lubbock County. It recites in part:

> "Before me, Tommy Turner, Assistant Criminal District Attorney for Lubbock County, Texas, this day personally appeard C. H. Blanchard, who, after being sworn, upon oath says that he has good reason to believe and does believe and charge that one Leroy ... Green on or about the 12th day of January A.D. 1975

> and before the making and filing of this complaint in Lubbock County, did then and there intentionally and knowingly cause the death of an individual, Warren Andrew McKay, by shooting him with a gun. ..."

After Green was arrested, he confessed.

The federal question was raised by a motion to supress the confession which alleged that Green was illegally arrested in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and his illegal detention contributed to the making of the confession. (Trial R. 3). The trial court found that the confession was voluntarily made. The court further found that the taking of the voluntary statement was not the product of an illegal arrest. (Trial R. 74).

The Court of Criminal Appeals wrote concerning the contention that the written statement should have been excluded from evidence "because it was obtained by exploitation of his detention pursuant to an illegal arrest, citing *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 824 (1979); and *Brown v. Illinois*, 442 U.S. 59, 95 S.Ct. 2254, 45 L.Ed. 416 (1975). We agree and accordingly reverse." (Appendix A).

The court noted that it could not disturb the finding of the trial judge that the confession was voluntary, but it reversed the conviction because the facts which showed probable cause were omitted from the affidavit for the warrant, and therefore the arrest was illegal and the confession was the inadmissable fruit of that arrest.

## REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals in this cause has decided the federal question contrary, at least in principle, to

the holding of the Court of Appeals for the Fifth Circuit in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). The Court of Appeals held that the reasonable good faith of officers prevented the suppression of evidence because an officer believed that a law was violated, and he in good faith made an arrest and found contraband which was later introduced into evidence. That court noted that the good faith rule would be followed in the future.

The reasoning of the Court of Criminal Appeals is contrary in principle to the opinion of this Court in *United States v. Janis*, 428 U.S. 433 (1976), which held that evidence seized in good faith in a civil tax case was admissible even though it was obtained on a search warrant based upon an insufficient affidavit.

The reasoning in *Michigan v. De Fillipio*, 443 U.S. 31 (1979) should apply. This Court held that an officer could in good faith rely upon an invalid ordinance to make an arrest, until such ordinance had been declared invalid.

The exclusionary rule is designed "to deter future unlawful police conduct and not to repair" the personal constitutional rights of the party aggrieved. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

There is no basis for the exclusionary rule in this case, because its application can have no deterrent effect on future unlawful conduct of officers who act in good faith in making an arrest after learning that an arrest warrant had been issued. Where there is no reason for a rule, the rule should not exist.

In like cases in Texas, the exclusionary rule will be applied, but in a federal prosecution in the same state, under the ruling of the Court of Appeals for the Fifth Circuit, the exclusionary rule will not be applied. The

Fourth Amendment to the Constitution of the United States should be applied in a uniform manner. The Court should grant this writ and order the application of the exclusionary rule only where it would deter future unlawful conduct of officers.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the holding and opinion of the Court of Criminal Appeals.

Respectfully submitted,

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AUGUST 1981

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**NO. 59,380**

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**LEROY GREEN,**

*Appellant,*

**VS.**

**THE STATE OF TEXAS,**

*Appellee*

---

**APPEAL FROM**
**LUBBOCK COUNTY**

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**REVERSED AND REMANDED**

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**OPINION BY**
**SAM HOUSTON CLINTON, JUDGE**

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**Panel 3, 2nd Quarter, 1980**

**FILED IN**
**COURT OF CRIMINAL APPEALS**
**NOV. 26, 1980**
**Thomas Lowe, Clerk**

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**LEROY GREEN,** *Appellant*

**NO. 59,380 v. — Appeal from LUBBOCK County**

**THE STATE OF TEXAS,** *Appellee*

## OPINION

This is an appeal from a conviction for capital murder in which the jury returned negative findings upon the special issues submitted pursuant to Article 37.071(b), V.A.C.C.P. Appellant's punishment was assessed at life confinement.

The only evidence connecting appellant with the murder of Warren McKay is a written statement in which he confessed his participation in the aggravated robbery of the deceased and his wife, during the course of which Mr. and Mrs. McKay were shot and killed by Raymond Sanders and Robert Lee White.

According to appellant's statement, he, Sanders and White, armed with two shotguns, drove to the McKay home on the evening of January 12, 1975, and parked in the driveway. Warren McKay came out of the house and over to Sanders' pickup. Robert Lee White got out of the truck, walked around to the front and pointed a shotgun at McKay. Appellant exited the pickup with the other shotgun which was not loaded. Appellant's written statement continues:

> "Robert took the wallet from Mr. McKay and gave it to me. I opened it and looked into it. There was a one hundred dollar bill and some more. I do not know how much, then I gave it back to McKay. Raymond said wait a minute. Raymond and Robert brought Mr. and Mrs. McKay into the house, Mrs. McKay asked what are you going to do with us. Raymond

told her we are not going to hurt you. I also said that we were not going to hurt you. Mrs. McKay asked if she could get a coat. She pointed to her and Mr. McKay's coat. We said okay, they put their coats on and Mrs. McKay asked if she could put on some shoes. Raymond said that you are just going down the street. We then took them out of the house. I asked Raymond where [sic] we were going to do with these damned people, and he told me to put them in the back of the pickup. I told him that it was cold back there, so Raymond told me not to back up now. Raymond said to the McKays, get in the back of the truck. I was already back there. Both of the McKays got into the back of the pickup where I was at. Robert got into the back of the pickup. Raymond got into the pickup and backed it up and then he drove off. We drove down a road real fast for a long time. We were laying down in the back. After awhile Raymond finally stopped the truck and I helped Mr. McKay out. They got out over the tailgate, then Mr. and Mrs. McKay started to walk off. Raymond told me what are you going to do, go ahead and shoot them. I told him that I did not have any shells. I asked Raymond, where are the shells, then Raymond took the shotgun away from me. I turned around and then I heard a shot and then another and another. It was three shots altogether that I heard. I turned around and saw the lady, Mrs. McKay, laying in the road.[1] She was laying on her stomach. I do not

[1]The bodies of Mr. and Mrs. McKay were found about 100 yards from some tire tracks on the shoulder of the road which were later identified as having been made by Sanders' truck.

know if she was dead or not. I did not see the man, this being Mr. McKay. Robert and Raymond were walking back toward me. We got into the truck and drove off."

Sanders asked appellant how much money they had gotten and the latter counted out about $174.00. The concluding statement in appellant's account of the murders was, "I . . . want to say that Robert and Raymond did shoot and kill Mr. and Mrs. McKay."

Appellant now complains in six grounds of error that his written statement should have been excluded from evidence[2] because it was obtained by exploitation of his detention pursuant to an illegal arrest, citing Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); and Brown v. Illinois, 422 U.S. 59, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). We agree and accordingly reverse.

The record reflects that Mr. and Mrs. Dub Coffee lived a short distance from the McKay house. During the evening hours of the date of the murders, Mr. and Mrs. Coffee had been at home. At that time, three black men had come to their house. They knew that Raymond Sanders was one of those men, but they did not know who the others were.

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[2]Specifically, appellant assails the trial court's actions in: (1)failing to grant his motion to suppress his written statement; (2)admitting the statement into evidence; (3)finding that his arrest was lawful; (4)failing to find there was an unnecessary delay in taking him before a magistrate; (5) failing to find appellant's arrest was without probable cause; and, (6)failing to find that the "voluntary statement of the accused" was obtained as a result of the illegal arrest and during a period of unnecessary delay before taking him before a magistrate. Six additional grounds of error attack various rulings of the trial court concerning presentation of the confession for consideration by the jury at trial on the merits.

As a result of law enforcement officers' talking to the Coffees, a search for Raymond Sanders ensued. The officers went to the house where Raymond Sanders lived and found out where he worked. They found a pickup that belonged to his employer and observed the tires on that pickup, as well as the tracks that they made. The officers compared those tracks and believed them to be the same as those found both at the Coffee and McKay residences. Likewise, the tracks compared favorably with those found on the shoulder of the road about 100 yards from where the bodies had been found.

Based upon all of the facts that they had at their disposal at the time, the officers obtained a search warrant for the home of Sanders. At the Sanders house, the officers seized two shotguns. Raymond Sanders was immediately arrested at his house and taken to the Lubbock County Sheriff's Office. Subsequent testing upon the weapons seized failed to reveal any fingerprints on them.

Upon arriving at the Sheriff's Office Justice of the Peace F. H. Bolen was summond, and a complaint was sworn by Sheriff C. H. Blanchard against appellant, alleging he had committed the murder of Warren McKay; on presentation of this complaint to Judge Bolen, a warrant for appellant's arrest issued.

As soon as the arrest warrant issued for appellant, this fact was broadcast over police radio to some seven Lubbock County law enforcement officers and two Texas Rangers, who were already combing the county, investigating the whereabouts of Leroy Green and Robert Lee White.

After going into a few more residences and "joints," the officers came to a "project" complex at 2610 Wever Drive. Deputy P.R. Wilbanks and Ranger Tommy Walker, armed with shotguns, approached an apartment

in which they believed appellant to be. It was approximately 2:00 a.m.

After knocking loudly a few times, other residents began to open their doors into the hall. Wilbanks asked a woman across the hall "if this is the residence of Leroy Green," and she replied that she thought so. So Walker knocked on the door again, but with the butt of his shotgun. The officers then decided to "go ahead and force entry." Walker kicked the door twice, then Wilbanks kicked it, to no avail. So, both officers backed up and ran through the door knocking it off its hinges and the facing off the frame.

Inside, the officers first confronted appellant's mother, Adell Green, who had been on her way back to her bedroom to get a robe. According to Mrs. Green, she could not tell exactly who was there because flashlights were being pointed at her:

> "...I went to pull the curtains back to see who it were and by the time I got the curtains back...one of them said, 'Don't move' and I said, 'Well, I don't have any right to run...will somebody please tell me what's going on?' and nobody ever said anything to me."

The officers started asking for Leroy Green and made their way into a bedroom where appellant and his brother, Sammy, were sleeping. Shining flashlights and pointing shotguns at appellant and his brother, the officers asked if one of them were Leroy Green, and appellant jumped up, standing on his bed with his hands up and said, "Yes, I'm Leroy Green."

Appellant was then led toward the front door and handcuffed with his hands behind him. Dressed in only a T-shirt and under shorts, appellant was led out the front door and Ranger Walker recited to him his *Miran-*

*da*[3] warnings. The eighteen year old appellant was then taken outside and placed in a patrol car. It was 29° outside.

Though the testimony conflicted slightly, it appears that appellant asked the officers if someone could get him some clothes and, after circling the block, they returned to the apartment and asked someone to go in for some clothes. Appellant's brother went in and returned with a pair of pants, but no shoes or shirt.

The evidence clearly established that appellant was not taken to the Sheriff's Office for almost an hour.[4] Deputy Wilbanks explained the delay thus:

> "We were still in the process of looking for another individual and Leroy Green was giving us some information as to how we might contact this third person and we were relaying this information to other officers via the radio and occasionally we would stop, might pull over to see what might turn up..."

According to Ranger Walker,

> "Well, I was completely lost, I had no idea where in Lubbock that I was. I know that we questioned Leroy as to the whereabouts of [Robert Lee] White and we--he gave us some information, several addresses and we put them out on the air, maybe one address at a time. I remember stopping at one place while some deputies checked the address to see if White was there..."

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[3]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 313 (1975).

[4]At trial on the merits, Deputy Wilbanks testified that soon after appellant was first warned, he asked the latter whether he waived his rights, and appellant simply said nothing.

The evidence is, however, undisputed that appellant was arrested sometime between 2:30 and 2:40 a.m., and booked in at the Lubbock County Jail at 3:30 a.m. The weight of the positive testimony, including that of a former Assistant District Attorney, is that appellant was brought in wearing nothing but his undershorts and T-shirt.[5]

Though Judge Bolen was still at the Sheriff's Office -and in fact remained there until approximately 5:00 a.m. - appellant was not taken before him at any time through that night.[6]

Once at the jail, appellant was first put in a room with "several officers." Ranger Horger warned him and talk-

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[5]The trial court failed to make any findings of fact regarding the factual details of the evening's events.

[6]The warrant for appellant's arrest had specifically commanded that, upon his arrest, he be brought before Judge Bolen "instanter."

Article 15.17(a), V.A.C.C.P. provides:

> "(a) In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law."

ed to him briefly.[7] Then appellant was placed for a short time in a holdover cell, then brought out and booked. Thereafter, according to Deputy Sheriff Alton Hobbs, he first saw appellant at approximately 4:00 a.m., sitting where the latter had been moved to one of the "Investigative Offices." Deputy Earnest Rector, Ranger Frank Horger and Captain Montgomery were also present. Deputy Hobbs warned appellant and satisfied himself that appellant understood. According to the officers, appellant did not request a lawyer and indicated he wanted to talk.[8]

According to Hobbs, he and Rector[9] started taking appellant's statement at about 4:30 a.m.. After listening to appellant's verbal account of the murders, Rector began to write the events down in longhand. Then Hobbs wrote in longhand until the narrative was recorded. Rector thereafter typed the content of the longhand notes on a statement form. After it was completed, the statement - beginning with warnings - was read to appellant as he read along from a copy. Corrections were made and appellant initialed them.

At 7:45 a.m., appellant signed the completed three page statement, which was witnessed by Captain Montgomery and Deputy Delwin Keesee. It was established that sometime during the 3-1/2 hours it took to obtain the completed statement, appellant's mother and father came to the jail and attempted to see him, but they were told he would be unavailable that night.

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[7]Horger testified that he told appellant that they "had Sanders in custody," that Sanders had "explained," and it was "no accident" that [appellant] was in custody" and they were "looking for Robert White."

[8]Appellant, of course, disputed this.

[9]There was testimony that Ranger Horger was not present during the time the statement was being taken and we may infer from certain testimony that Captain Montgomery was also absent.

Appellant's contention that *Dunaway v. New York* and *Brown v. Illinois* govern the disposition of his conviction, is predicated upon the assertion that his arrest was unlawful.

The complaint in the form of an affidavit by Sheriff Blanchard, on which the warrant for appellant's arrest issued, alleged:

> "Before me, Tommy Turner, Assistant Criminal District Attorney of Lubbock County, Texas, this day personally appeared C. H. Blanchard, who, after being sworn, upon oath says that *he has good reason to believe and does believe and charge that one Leroy Green*...on or about the 12th day of January, A.D. 1975, and before the making of this complaint in Lubbock County, and State of Texas, *did* then and there *intentionally and knowingly cause the death of an individual, Warren Andrew McKay, by shooting him with a gun* AGAINST THE PEACE AND DIGNITY OF THE STATE.
>
> [signed] C. H. Blanchard
>
> Sworn and subscribed before me, this the 15th day of January, A.D. 1975.
>
> [signed] Tommy Turner
> Assistant Criminal District
> Attorney of Lubbock County,
> Texas."[10]

On the sole basis of the above complaint, Judge Bolen

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[10]All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

issued the warrant for appellant's arrest.[11] It is instantly apparent that this affidavit consists of nothing more than Sheriff Blanchard's conclusion that appellant perpetrated the murder described in the complaint.

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[11]During the hearing on appellant's motion to suppress, Sheriff Blanchard testified:

> Q: ...Sheriff, were you in charge of the investigation of the murders of Warren and Odessa McKay?
>
> A: Yes, sir.
>
> Q: And you had taken an active part in the investigation itself, had you not?
>
> A: That's correct.
>
> Q: And you had been up and seen the bodies...[a]nd saw the kind of wounds?
>
> A: Yes, sir. *** The wounds -- naturally, this is through a process of checking, the wounds were determined to be made by a shotgun.
>
> Q: Okay. You had been around taking an active part at several locations up near where the bodies were found and where the McKays lived and where the Coffees lived and the whole general area, had you not?
>
> A: That's correct, yes, sir.
>
> Q: And you did swear out a complaint before Tommy Turner, did you not?
>
> A: Yes, sir, I did.
>
> ***
>
> Q: And these were taken to Judge Bolen...?
>
> A: Yes, sir.
>
> Q: Did you observe Judge Bolen issue the arrest warrants[for Leroy Green and Robert White]?
>
> A: Yes, I did.
>
> ***

*(footnote continued on next page)*

In Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 1035, 28 L.Ed.2d 306 (1971), the Supreme Court of the United States reiterated,

> "The decisions of this Court concerning the Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965; Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed2d. 887 (1964); Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958)."

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*(continuation of footnote on previous page)*

> Q: And prior to that time you were already looking for those individuals....You had been checking various places, is that correct?
>
> A: That's correct.
>
> Q: And when you swore out the complaint you indicated -- did you talk to Judge Bolen?
>
> A: Yes, sir, I did.
>
> Q: *Did you indicate to him what your personal knowledge of the case was*?
>
> [Defense counsel]: Your Honor, I object to that *unless he was under oath.*
>
> The Court: I'll sustain the objection.
>
> [Prosecutor]: *I have no further questions.*

We believe that the recent decision of this Court in Knox v. State, 586 S.W.2d 504 (Tex.Cr.App. 1979), is dispositive of the issue concerning the validity of appellant's arrest here. In the words of Presiding Judge Onion:

> "...[T]he Supreme Court has held that the exclusionary rule [is] applicable to State prosecutions, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and that the same probable cause standards [are] applicable to federal and state warrants under the Fourth and Fourteenth Amendments. Still further, see Article I, §9, Texas Constitution; cf. Article 38.23, V.A.C.C.P.
>
> ***
>
> The actual basis for the complaint's conclusion is omitted from the complaint. The complaint contains no allegations that the complainant spoke with personal knowledge of the matters contained [there]in and [does] not indicate any source for the complainant's belief, nor set up sufficient information to support an independent judgment that probable cause existed."

Thus it is clear that "[t]he magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on *** to show probable cause'." *Aguilar v. Texas,* supra, at 1513 S.Ct., quoting *Giordenello v. United States,* supra, at 1250 S.Ct. Judge Bolen necessarily accepted "without question" Sheriff Blanchard's "suspicion," "belief" or "mere conclusion" that appellant committed the offense described in Blanchard's affidavit in the form of a complaint. *Id.;* see also Barnes v. Texas, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d818 (1965); and after remand, Barnes v. State, 390 S.W.2d 269 (Tex.Cr.App. 1965).

We are constrained to conclude that the affidavit before us provided Judge Bolen with no basis for an independent determination of probable cause and the arrest warrant that issued pursuant thereto, was invalid. *Knox v. State,* supra; Evans v. State, 530 S.W.2d 932 (Tex.Cr.App. 1975); see also and compare Lowery v. State, 499 S.W.2d 160 (Tex.Cr.App. 1973); Kemp v. State, 464 S.W.2d 141 (Tex.Cr.App. 1971).

Furthermore, the record before us is devoid of evidence which would have authorized appellant's arrest without a warrant under the statutory law of this State. See Article 14.01, *et seq;* see generally, *Lowery v. State, supra.*

We therefore hold that appellant's arrest was unlawful, and the trial court erred in concluding otherwise.[12]

Having determined that appellant's arrest was in violation of the Constitution and the law of this State as well as the Fourth and Fourteenth Amendments to the Constitution of the United States, the question remains: whether the connection between appellant's unauthorized arrest and his incriminating statements obtained during his illegal detention was sufficiently attenuated to permit, at trial, the use of that statement? *Dunaway v. New York,* supra; and *Brown v. Illinois,* supra.

For its part in this appeal, the State argues only that the findings and conclusions of the trial court - that appellant's confession was *voluntary* under traditional

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[12]Because the trial judge concluded as a matter of law that appellant's arrest was legal, he necessarily failed to make findings and conclusions regarding any "causal connection" between the invalid arrest and appellant's written statement obtained later that night. The trial court likewise refused to submit the "causal connection" issue to the jury over appellant's objection.

Fifth Amendment notions - are supported by the record, and the admission of appellant's inculpatory statement into evidence was therefore proper.

The position urged by the State here is similar to that adopted by the New York Court of Appeals which prompted the Supreme Court's decision in *Dunaway v. New York*; the Supreme Court commented at 2259, 2260 S.Ct.:

> "This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in *Brown* [v. Illinois]."

In *Brown v. Illinois,* the Illinois Supreme Court had held that *Miranda* warnings in and of themselves broke the causal chain so that any statement was admissible so long as it was "voluntary" in the traditional sense and not coerced in violation of the Fifth and Fourteenth Amendments. In rejecting such a notion, the Supreme Court reasoned that it avoided resolving the question of whether statements obtained by exploitation of an illegal arrest, a Fourth Amendment violation, should be excluded.

Observing that application of the exclusionary rule in effectuating the Fourth Amendment serves policies and interests different from the Fifth Amendment, the Court held:

> "*Wong Sun*[13] requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' 371 U.S. at 486, 83 S.Ct. at 416. *Wong Sun* thus

[13]Won Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963).

> mandates consideration of the statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

422 U.S. at 2261 S.Ct.

The Court in *Brown v. Illinois* identified a finding of "voluntariness" as merely a "threshold requirement" for Fourth Amendment analysis; later, in *Dunaway v. New York*, the Court elaborated, "[i]ndeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached." 99 S.Ct. 2259.

In the instant case, the trial court found that appellant was warned of his constitutional rights, and concluded that appellant thereafter gave his incriminating statement voluntarily. Because the trial court is the sole trier of fact at a hearing upon a motion to suppress, this Court is not at liberty to disturb any finding which is supported by the record, McKittrick v. State, 541 S.W.2d 177 (Tex.Cr.App. 1976); we accordingly defer to those determinations.

Having determined appelant's confession was voluntary as a "threshold requirement," we turn now to the Fourth Amendment analysis prescribed by *Dunaway v. New York* and *Brown v. Illinois*, in order to determine whether the State has met its burden of establishing that appellants confession was not the product of his illegal arrest and detention.

As identified in *Brown v. Illinois*, supra, and reiterated in *Dunaway v. New York*, supra; the factors to be considered in determining whether the confession has been obtained by exploitation of the illegal arrest, are

(1) whether *Miranda* warnings were given;

(2) the temporal proximity of the arrest and the confession;

(3) the presence of intervening circumstances; and,

(4) the purpose and flagracy of the official misconduct.

The salient facts of the instant case are remarkably similar to those constituting the arrest, detention and confession of Brown. As Brown approached the door of his apartment in the early evening, he saw a pistol pointed at him through a window near the door. The stranger holding the revolver said, "Don't move, you are under arrest.' Another came up behind him with a gun and again told him he was under arrest. Brown was told to stand against a wall and was searched. The officers found nothing.

On Brown's denial of his identity, he was shown a photograph of himself and told he was under arrest for murder. Brown was then handcuffed and escorted to a squad car. On arrival at the police station, Brown was placed in an interrogation room and warned by two officers. He was questioned and then told that a bullet known to have been fired by him was being compared with one found in the body of the deceased.

After Brown gave a statement, he was taken out to look for his co-defendant. After finding Brown's confederate, Brown was placed alone in an interrogation room for several more hours and gave a second statement which he refused to sign. Fourteen hours after his arrest, Brown was taken before a magistrate.

The officers testified that they had arrested Brown for purposes of questioning him as part of a murder investigation.

The primary factual differences between *Brown v. Illinois* and the instant case are that the arrest of appellant was effected in the middle of the night, with officers rousing him from sleep, pointing shotguns in his direction, then leading him out into freezing weather with no coat, outer clothing or shoes.

In determining that the State failed to meet its burden of proving that Brown's confession was obtained by means sufficiently distinguishable to be purged of the initial taint, instead of by exploitation of the primary illegality, the Supreme Court noted that the first statement was separated from the illegal arrest by less than two hours, and there was no intervening event of significance whatsoever.

In a statement we believe to be equally applicable to the instant case, the Supreme Court observed,

> "The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they *repeatedly acknowledged*, in their testimony, that *the purpose of their action was 'for investigation' or 'for questioning'...The arrest, both in design and execution, was investigatory.* The detectives embarked upon this expedition for evidence in the hope that something might turn up. *The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion.*" 95 S.Ct. at 2262.

In the case before us, it was conceded by all the officers involved that they had been foraging Lubbock on an evidence expedition for some time before they found appellant. Sheriff Blanchard likewise confirmed that appellant was the object of a manhunt even before the

warrant for his arrest issued. Though Sheriff Blanchard went through the formality of obtaining a warrant for appellant,[14] the entire course of conduct engaged in by the law enforcement community was patently investigatory in nature.

As in both *Dunaway v. New York* and *Brown v. Illinois*, the accused herein was given his *Miranda* warnings, but that event cannot alone serve to outweigh other factors extant.[15] Appellant began giving his confession approximately two hours after his arrest. The only intervening event of significance reflected by the record militates against the State: that after appellant's arrest, but before his arrival at the county jail, he was driven around the city with the officers as they continued their investigation of the murders and their search for Robert Lee White.

Interrogation of appellant began almost immediately on his arrival at the Sheriff's Office. Appellant's parents were denied access to him, and he was not taken before Judge Bolen even though the magistrate was in the building. Clearly, no intervening events broke the connection between appellant's arrest and confession. "To admit [appellant's] confession in such a case would allow"law enforcement offices to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the "procedural safeguards" of the Fifth'." *Duanway v. New York*, supra, at 2260 S.Ct.

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[14]We are troubled by the fact that a warrant was obtained in 1975 on the basis of the Sheriff's manifestly insufficient affidavit in the form of a complaint, which is indistinguishable from the Lubbock County complaint condemned by the Supreme Court in 1965 in *Barnes v. Texas*, supra. For modern form that takes into account the *Barnes* holding see 7 Texas Practice 13, Morrison & Blackwell, Criminal Forms Annotated, §§1.04 and 1.05 and accompanying notes.

[15]This was, in fact, the direct holding of the Supreme Court in *Brown v. Illinois*.

We hold that the State has failed to meet its burden of showing that appellant's statement was admissible, and the trial court erred by permitting its introduction before the jury.

The judgment is reversed and the cause remanded to the trial court.

CLINTON, Judge

(Delivered November 26, 1980)

BY: Panel 3, 2nd Quarter, 1980, composed of:
Wendell A. Odom, Judge
Tom G. Davis, Judge
Sam Houston Clinton, Judge

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**NO. 59,380**

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**LEROY GREEN**

*Appellant,*

**VS.**

**THE STATE OF TEXAS,**

*Appellee*

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**APPEAL FROM LUBBOCK COUNTY**

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**DISSENTING OPINION TO DENIAL OF STATE'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING WITHOUT WRITTEN OPINION**

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**OPINION BY McCORMICK, JUDGE**

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EN BANC

W. C. DAVIS, J., JOINS IN THIS DISSENT

Filed in Court of Criminal Appeals May 27, 1981
Thomas Lowe, Clerk

**LEROY GREEN,** *Appellant*

**NO. 59,380 v. Appeal from Lubbock County**

**THE STATE OF TEXAS,** *Appellee*

## DISSENTING OPINION TO DENIAL OF STATE'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING WITHOUT WRITTEN OPINION

I believe the majority opinion fails adequately to address the reasoning behind the exclusionary rule as presented in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and Brown v. Illinois, 442 U.S. 59, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and the good faith of the officers in the execution of the arrest under the facts before us. Because the facts must be viewed with an eye toward how law enforcement reacted, a brief recital of the facts preceeding the arrest is necessary.[1]

I.

On the night of January 12, 1975, the Lubbock County Sheriff's Department discovered two bodies outside the rural community of New Deal. The bodies of an elderly couple were found lying face down and partially covered with snow. The victims, identified as Mr. and Mrs. McKay, had been killed by shotgun blasts in the backs. Deputies Hobb, Rector, and Hill proceeded to the McKay's house. Upon arrival, they found the house unlocked and unoccupied. An examination of the surrounding area disclosed the presence of automobile tracks that matched neither of the McKay's vehicles. The tracks appeared to be those commonly associated

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[1]This is a companion case to White v. State, 591 S.W.2d 851 (Tex. Cr.App. 1979).

with a three-quarter ton pickup truck. The vehicle's tracks indicated that it had pulled up in the driveway, then backed out and left.

The next day, January 13, 1975, the officers also located a similar set of tracks at the nearby Coffee residence. Further, during the subsequent investigation of the murder scene, the officers again located an identical set of tracks matching those previously found. These latter tracks were approximately one hundred yards from where the bodies of the McKays had been found and showed that the vehicle had stopped on the shoulder of the road.

At the Coffee residence, the officers learned that during the evening hours on the date of the murders, Mr. and Mrs. Coffee had been at home. At that time, three black men had come to their house attempting to sell corn for feed. The Coffees identified a Raymond Sanders as one of the men, but they did not know the other two. From a subsequent photographic lineup, Mrs. Coffee identified appellant.

As a result of the information obtained from the Coffees, a search for Raymond Sanders ensued. Upon ascertaining where Sanders was employed, the officers proceeded to a local farm. They found a pickup that belonged to Sanders' employer and examined the tires on that pickup. The officers also observed that the tracks made by the truck were identical to those found at the Coffee and McKay residences. Additionally, the tracks matched those found on the shoulder of the road near where the bodies were found.

On January 14, 1975, and pursuant to a search warrant, Raymond Sanders' home was searched. Seized were two shotguns hidden in the attic above the garage. Sanders was immediately arrested and taken to the Lubbock County Sheriff's office. At the Sheriff's of-

fice, Sanders confessed and made statements implicating appellant and another individual, Robert White.[2] Sanders also gave the officers a description of an automobile that the other two suspects may have been using. An immediate search began for appellant and White.

Involved in the county-wide search for appellant were Texas Ranger Tommy Walker and Deputy P. R. Wilbanks. In their search for appellant, the officers checked residences and a local "joint" that appellant was known to patronize frequently. It was during this period that the officers received word that a formal arrest warrant had been issued for appellant. The officers received the arrest warrant number (8021), the name of the arrestee (appellant), and the charge (murder).[3]

The officers, with knowledge of appellant's possible connection to the offense and with notice of the formal issuance of the arrest warrant, proceeded to a housing complex at 2610 Weber Drive. The officers approached the apartment in which they believed appellant to be. After knocking loudly for several minutes, a woman across the hall opened her door. The officers inquired "if

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[2]The defendant confirmed Sanders'confession at the pre-trial hearing on the motion to suppress: "A. Raymond Sanders was sitting right in front of this desk, in the room that's designated A, sitting in a chair on this corner facing me, and he said, 'Say, Leroy, man, I don't know what to tell you, man', he said, 'I done told them everything that happened', just like that. He said, 'Man, I didn't have no other choice.'"

Also see footnote 7 of majority opinion.

[3]The arrest warrant was issued after the complaint sworn to by Sheriff Blanchard was presented to Justice of the Peace F. H. Bolen.

Although the confession of Sanders would adequately support the probable cause element of the arrest warrant, the affidavit failed to show sufficient facts to support the warrant. Therefore, the officers had probable cause to arrest but a defective arrest warrant.

this is the residence of Leroy Green", and she replied that she thought so. The officers repeated their knocking for approximately fifteen to twenty minutes. The officers then forced entry.

Inside, they encountered appellant's mother and other members of the family. In one of the bedrooms the officers confronted appellant and his brother. The officers asked if one of them was Leroy Green. Appellant jumped up, kneeling on his bed, and identified himself.

Appellant was immediately taken into custody, warned of his rights, and placed in the deputy's car. Appellant was originally apprehended in only a T-shirt and shorts. After appellant was placed in the car, the officers allowed appellant to request and receive clothing.[4]

Although it took from thirty minutes to an hour to deliver appellant to the sheriff's office, the delay was due to the ongoing search for a third suspect. Finishing the quote the majority started, Ranger Walker stated:

> "...I know that we questioned Leroy as to the whereabouts of White and we -- he gave us some information, several addresses and we put them out on the air, maybe one address at a time. I remember stopping at one place while some deputies checked the address to see if White was there, *but in general we didn't roam around town, we come generally straight on down to the jail.*" (Emphasis added)

Once the defendant arrived at the police station, he gave the statement which the majority recognizes to have been voluntary.

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[4]The majority accepts appellant's version that the officers circled the block before getting the clothing. The officers' testimony, however, stated that they allowed appellant to acquire clothing before they left the housing complex.

II.

Regardless of the probable cause to arrest appellant without a warrant, the majority holds that the invalid arrest warrant vitiates the subsequent confession. However, I feel the application of the exclusionary rule to the confession obtained under the circumstances in this case inappropriate. This is so because the exclusionary rule is designed "to deter future unlawful police conduct" and not to repair "the personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 347-348, 94 S.Ct. 613, 620, 38 L.Ed2d 561, 571 (1974). This deterrent function "necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendent of some right.***Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed2d 182 (1974). Accord, Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed2d 343 (1979).

As the majority has stated, the factors to be considered in determining whether the confession has been obtained by exploitation of the illegal arrest are (1) whether the rights guaranteed under *Miranda* were given, (2) the temporal proximity of the arrest and the confession, (3) the presence of intervening circumstances; and, (4) the purpose and flagrancy of the official misconduct. Since it is established the deterrence to police misconduct is the touchstone of the exclusionary rule, the fourth factor, *the purpose and flagrancy of the police misconduct,* must necessarily be the prime consideration. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed2d 1867 (1976). Moreover, the warning of rights under *Miranda* is also of great

importance.[5] It is these two prominent factors that must be closely scrutinized.

I have no disagreement that there was a close proximity of the confession to the arrest. Nor do I dispute the fact that there were no intervening circumstances between the time of the arrest and the subsequent valid confession. The problem arises in the "purpose and flagrancy of the official misconduct" and the "giving of the *Miranda* warnings."

The majority correctly points out that appellant was warned of his constitutional rights and that his confession was voluntary. This, the "Miranda" factor has been satisfied. Having overcome the threshhold requirement that the confession is voluntary, however, the majority then concludes that the warrant affidavit was insufficient, resulting in an illegal arrest.

From the facts in this record, I find that the officers had probable cause to arrest appellant. He had been identified to have associated with another suspect already in custody and closely linked with the brutal murders. The two arresting officers, while attempting to locate appellant, received word that an arrest warrant

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[5]In Brown v. Illinois, supra, at 603, the Supreme Court stated:

> "It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the Miranda warnings alone and per se, cannot *always* make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."

Further, although the Court dismissed a per se rule that *Miranda* warnings break the causal connection between the illegality and the confession, the Supreme Court soundly rejected the notion that *Miranda* warnings can *never* purge the taint:

> "While we therefore reject per se rule which the Illinois Courts appear to have accepted, we also decline to adopt any alternative per se or 'but for' rule." Supra at 603.

had been formally issued. Acting upon good faith belief that the warrant was valid, the officers proceeded to appellant's residence. Upon arrival, the officers repeatedly knocked and identified themselves. After approximately fifteen to twenty minutes, the officers forcibly entered the apartment. Although the entry was forced, such an entry based upon an arrest warrant does not infringe upon constitutional rights. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed2d 639 (1980).

The events subsequent to the arrest, although not commendable acts on the part of the law enforcement, do not constitute a part of the "purpose and flagrancy" of the misconduct, i.e. the illegal arrest. The obvious reason is that the arrest is illegal *only* because the supporting affidavit was insufficient. The events that occurred *after* the "illegal arrest" go to the voluntariness of the confession, an issue already decided adversely to appellant.

Therefore, I believe the facts of this case are clearly distinguishable from the *Dunaway* and *Brown* scenarios. Our case was based upon an arrest warrant, supposedly supported by probable cause. Officers, acting in good faith, validly executed that warrant. In *Dunaway* and *Brown*, both arrests were made without warrants and without probable cause which was acknowledged by the prosecution. Such is not the situation we have here.

I would hold that the good faith of the officers and the *Miranda* warnings is sufficient to purge the taint of the illegal arrest. Compare, United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed2d 1046 (1976)(evidence seized in good faith *not* suppressed in civil tax case which was seized based on an insufficient supporting affidavit to the search warrant); People v. Lent, 433 N.Y.S.2d 538 (Sup. 1980)(teletyped arrest warrant subsequently held

invalid; however, the good faith action of police officers prevented suppression of evidence from the search incident to that arrest); People v. Pierce, 411 N.E.2d 295 (Ill.App. 1980)(search warrant subsequently held invaled; however, evidence seized and confession of suspect admissible due to officers' reasonable, good faith belief that warrant was valid).

Furthermore, such a conclusion would fully comport with the recent rule adopted by the Fifth Circuit Court of Appeals in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). That Court, sitting en banc, made an exhaustive analysis of the exclusionary rule. They went on to rule that henceforth in that circuit, evidence obtained by police conduct that is alleged to be unlawful shall not be suppressed if the government establishes that the conduct, if mistaken or unauthorized, was taken in the reasonable good faith belief that it was proper.[6]

The court emphasized that the exclusionary rule is not itself a constitutional requirement, but is a "judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct." 622 F.2d at 841-842. Recognizing that the judicially created exclusionary rule is ineffective where the officers' conduct is neither willful nor negligent, the Fifth Circuit adopted part of Justice White's dissent in Stone v. Powell, supra:

> "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized

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[6]The Fifth Circuit felt that at least "four current members of the United States Supreme Court have urged the adoption of a good-faith exception to the exclusionary rule." United States v. Williams, supra, at 841 (quoting Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J.Crim.L. and Criminology 635 (1978).

> is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted."

The United States Supreme Court has rejected the rule that *Miranda* warnings will, per se, cure the taint of a confession which followed an illegal arrest. Likewise, the Court has rejected the other extreme; i.e., that a confession following an illegal arrest must be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The application of the exclusionary rule to the voluntary confession of appellant in this case does nothing to accomplish its stated purpose. The State sufficiently proved that the officers acted on a reasonable, good-faith belief that the arrest warrant was valid. If the circumstances were repeated, there's no doubt that the officers would pursue the same course of conduct.

Until the United States Supreme Court is presented with the opportunity to reject or accept the reasonable good-faith exception to the exclusionary rule, I respectfully dissent.

McCormick, Judge

(Delivered May 27, 1981)
En Banc
W. C. Davis, J., joins this dissent

# Opposition

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81-403

NO. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE STATE OF TEXAS,
Petitioner

V.

LEROY GREEN,
Respondent

# BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Leroy Green, Respondent
Lubbock County Jail
Lubbock, Texas 79401

## QUESTION NOT PRESENTED

The question which the State of Texas deems presented in this case:

> Should the exclusionary rule bar admission of a voluntary confession that is the fruit of a good faith arrest that is technically illegal because of a defective affidavit underlying the warrant?

is not presented by the record in this case because:

1. The confession was not the fruit of a good faith arrest.

2. The arrest was not in good faith.

3. The question of good faith has not been ruled upon by any Texas court in this case.

4. The exclusionary rule is adopted by statute in Texas.

INDEX


| | Page |
|---|---|
| QUESTION NOT PRESENTED | i |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| CONCLUSION | 10 |

TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Brown vs. Illinois, 422 U.S. 59, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) | 10 |
| Dunaway vs. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) . . . . . | 9 |
| Henry vs. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed. 813. . | 9 |
| **Constitutions, Statutes and Rules** | |
| Tex.Code of Crim. Proc. Art. 38.23. . | 4 |
| 28 U.S.C. Sec. 1257(3). . . . . | 3 |
| U.S. Const., amend.IV . . . . . | 2 |
| U.S. Const., amend.XIV. . . . . | 3 |

NO. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE STATE OF TEXAS,
Petitioner

V.

LEROY GREEN,
Respondent

# BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Respondent respectfully prays that the Court not issue a writ of certiorari to review the Judgment and Opinion of the Court of Criminal Appeals of Texas of May 27, 1981.

## OPINION BELOW

The Opinion of the Court of Criminal Appeals and the Dissenting Opinion are reported at 615 S.W.2d 700 (Tex.Crim.App. 1981), which appears as Appendix A and B of

the Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas.

## JURISDICTION

This Court's jurisdiction is not invoked under 28 U.S.C. Sec. 1257(3). The Petition for Writ of Certiorari does not question the validity of a treaty or statute of the United States. The Petition does not question the validity of a state statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States. No title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States is questioned by the Petition.

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

### United States Constitution Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution
Amendment XIV
Pertinent Part:

Section 1.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 1257(3).
Pertinent Part:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States,

> or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United Statues."

Article 38.23 Texas Code of Criminal Procedure Pertinent Part:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

## STATEMENT OF THE CASE

At approximately 2:00 o'clock a.m. on the morning of the 16th day of January, 1975, with the temperature below freezing at 29° Fahrenheit, the Respondent, Leroy Green, was arrested by officers of the Texas Rangers and by deputy sheriffs from the Lubbock County Sheriff's office. He was arrested under a warrant which was illegally obtained. He was arrested by officers who had been searching residences and "joints"

even before any warrant whatever was obtained. There was no probable cause at the time of the arrest either in the complaint (affidavit) or in the record before the trial court in this case. In other words, at the time of the arrest, there was not probable cause.

The State's Petition for a Writ of Certiorari is in error in its recitation that Raymond Sanders implicated the Respondent, Leroy Green. There is no such evidence in the record.

The officers kicked in the door, knocking it off its hinges and the facing off the frame. At approximately 2:00 o'clock a.m. with the temperature below freezing (29°F), the Respondent, Leroy Green, was taken out of the house dressed only in a T-shirt and undershorts. Still in T-shirt and undershorts and in the freezing cold, he was given his miranda warnings.

After he was arrested, it took the officers almost an hour to take a fifteen

minute drive because the officers were still looking for another individual and Leroy Green was giving them some information as to how they might contact this person. Even a former assistant district attorney testified that when Leroy Green was brought into the jail, he was wearing nothing but his undershorts and T-shirt.

A justice of the peace who had issued the warrant was present in the jail. The Respondent, however, was not taken before that justice of the peace until several hours later.

Some time during the three and one-half hours it took to obtain the confession, Respondent's mother and father came to the jail and attempted to see him but they were told that he was unavailable for that night.

The trial court found that the confession was voluntarily made and that the taking of the voluntary statement was not the product of an illegal arrest.

The Court of Criminal Appeals found

that the written statement should have been excluded from evidence because it was obtained by exploitation of his detention pursuant to an illegal arrest.

At no time during the trial or in the briefs or arguments before the Court of Criminal Appeals of Texas did the State ever contend that the officers were acting in good faith. There was never a finding by any judge that the officers were acting in good faith. There was never a finding by any jury that the officers were acting in good faith. The facts do not support such an allegation.

## REASONS FOR THE COURT TO DENY THE WRIT

This court does not have jurisdiction under Title 28 U.S.C. Sec. 1257 to grant certiorari in the present case. Section 1257 gives this court jurisdiction where the validity of a treaty or statute of the United States is drawn in question. The validity of a statute or treaty of the

United States is not drawn in question in the case. That Section gives the court jurisdiction where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States. The validity of a state statute is not drawn in question on any grounds in this case. The Section further gives this court jurisdiction by writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States. In this case, there is no title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States.

A decision on the question presented by the Petition for Writ of Certiorari in this case would not resolve this case. For the

moment, we can set aside the objections to the question as presented. Even if the exclusionary rule under the fourth and forteenth amendments to the United States Constitution did not require the exclusionary rule, Texas is free to do so. Texas has done so by Article 38.23 of the Texas Code of Criminal Procedure. Thus even if the court found that the exclusionary rule is not federally required, it would not change the results in this case. See Henry vs. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) (rehearing denied) 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed. 813.

The Court of Criminal Appeals of Texas both under state and federal law, properly ruled that the written statement of Respondent, Leroy Green, should have been excluded from evidence because it was obtained by exploitation of his detention pursuant to an illegal arrest. Dunaway vs. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824

(1979); and Brown vs. Illinois, 422 U.S. 59, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

CONCLUSION

For these reasons, a writ of certiorari should be denied.

Respectfully submitted,

Leroy Green

Leroy Green, Respondent